United Parcel Service *and* Paul Stimpson.
Case 7–CA–41749

September 30, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On December 27, 1999, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a cross-exception and a supporting brief.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

We agree with the judge that the Respondent violated Section 8(a)(3) and (1) by discharging Paul Stimpson for engaging in protected concerted activity. As the Board established in *Wright Line*,[4] the General Counsel is required to show by a preponderance of the evidence that animus against protected conduct was a motivating factor in the employer's conduct. Once this showing is made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Paul Stimpson began his employment with the Respondent in 1991 as a part-time sorter, placing packages on different belts according to zip codes and city and street information. At all material times, the bargaining unit employees, including Stimpson, were represented by Local 243 of the International Brotherhood of Teamsters, AFL–CIO. Beginning in 1997 and continuing until his discharge, Stimpson filed about nine grievances against the Respondent, with most of them concerning his employment and some alleging that the Respondent had violated the collective-bargaining agreement. David Staiger, a union steward who was credited by the judge, testified that Stimpson had filed far more grievances than the 70 other employees he represented (excluding himself), perhaps filing as many as all of them combined. The evidence reflects and the Respondent does not contest that it was aware of Stimpson's filing of the grievances.

Staiger testified that, in July 1996, he presented to Ken Wilson, a pre-load manager for the Respondent, a grievance protesting the supervisors' performance of unit work. The grievance was signed by numerous employees, including Stimpson. Soon thereafter, Wilson held a meeting with a group, including those employees, and said that people with attendance problems should watch and be careful about what they are signing. Staiger also testified that he filed another grievance, dated November 13, 1997, concerning an asserted safety problem in sorting. When Staiger presented the grievance to Wilson, Wilson became angry and stated that he would watch anyone who had signed the grievance and that he would write them up for missorting packages.[5] In the spring of 1998,[6] Wilson told Stimpson that he was a "troublemaker" because of his involvement in filing numerous grievances.

On August 17, Stimpson engaged in conduct that the Respondent asserts was relevant to its decision to ultimately discharge him. On that date, Stimpson and fellow employee Kevin Gunnery were working as sorters when a package on a conveyor belt became lodged against a bar. Gunnery walked on the moving belt to remove the package even though, according to the Respondent's rules, only supervisors were permitted to walk on the belts. Stimpson told Gunnery that he did not think that Gunnery was a manager or supervisor. The two employees began an argument in which Gunnery yelled profanities and threatened to kick Stimpson's ass, and Stimpson accepted the challenge by motioning for Gunnery to come down from the belt and called him a "kiss ass." After Gunnery complained to Wilson that Stimpson had threatened him, Wilson called both men into his office

[1] We deny the Charging Party's motion to strike portions of UPS's reply to Charging Party's brief in opposition to exceptions or in the alternative to respond to new material in the reply. Contrary to the Charging Party's assertion, the Respondent's reply to Charging Party's brief in opposition to exceptions does not appear to introduce any new material or argument not encompassed by its exceptions and brief in support of exceptions.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall also substitute a narrow cease-and-desist order for the broad one recommended by the judge. As the Board held in *Hickmott Foods*, 242 NLRB 1357 (1979), a broad cease-and-desist order requiring a respondent to cease and desist from "in any other manner" rather than the narrow "in any like or related manner" language should be reserved for situations where a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. We shall add to the notice a provision stating that the Respondent will remove any reference to the suspension and discharge, which was inadvertently omitted by the judge. Finally, we shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

[4] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398-403 (1982).

[5] The second grievance contains an illegible signature that may have been Stimpson's, although Stimpson did not testify regarding the signature and Staiger was unsure if Stimpson had signed it. In his decision, the judge discusses the two grievances together.

[6] All dates hereafter are in 1998 unless otherwise noted.

and told them that the Respondent would not tolerate such behavior and that they both would be discharged if it happened again.

On October 1, Stimpson accidentally hit a cart while driving a bulk train. Ernie Rodriguez, an employee working nearby, said that Stimpson should take driving lessons from Gunnery and learn to drive like him. Stimpson replied jokingly, "I don't want to learn how to be a suck dick." Rodriguez, Stimpson, and Tim Lee, another employee who overheard the comment, all laughed. Stimpson continued driving. Gunnery approached Lee and asked him what had been said. After Lee told him, Gunnery went to Wilson and said that Stimpson had called him a "cock sucker." After Wilson had obtained written statements from Lee, Rodriguez, and Gunnery[7] and consulted with his supervisor, Wilson suspended Stimpson. Thereafter, the Respondent discharged Stimpson per its October 6 letter, which stated that his "comments directed towards another employee . . . were totally inappropriate, intimidating, antagonistic and offensive [and] could be construed as sexual harassment, towards a fellow employee." The record reflects that both hourly employees and supervisors use profanity, that profanity is heard at work on a daily basis and that derogatory words directed at others are common. There is no evidence that the Respondent has ever disciplined an employee for using profane or derogatory language.[8]

We find, in agreement with the judge, that the record clearly reflects that Stimpson engaged in activity protected by Section 7 of the Act by filing numerous grievances, that the Respondent was aware of Stimpson's filing of these grievances, and that the Respondent took an adverse action against Stimpson by suspending and discharging him. The record also contains evidence of the Respondent's animus toward employees who file grievances and specifically toward Stimpson for his filing of grievances. In particular, Wilson told Stimpson in the spring of 1998 that he was a "troublemaker" because of his involvement in filing grievances.[9] In addition, Wilson warned employees in July 1996, in response to their filing of a grievance, to be careful about what they sign, and in November 1997, in response to another grievance, warned that he "would watch" anyone who had filed the grievance and would write them up if they missorted packages.[10]

The Respondent asserts in its brief to the Board that it discharged Stimpson for referring to a coworker in a vulgar, derogatory, offensive, and intimidating fashion after being warned for the same conduct in August. The Respondent stated in its October 6 letter that it was discharging Stimpson for directing comments to a fellow employee that were inappropriate, intimidating, antagonistic, and offensive, and could be construed as sexual harassment.

In fact, however, profane and derogatory language was commonly used at work; the Respondent's supervisors, including Wilson, were aware of it and used it themselves; and there is no evidence that the Respondent had ever disciplined an employee for using such language. See, e.g., *Sunbelt Mfg., Inc.*, 308 NLRB 780, 787 (1992), enfd. mem. in part 996 F.2d 305 (5th Cir. 1993) (company tolerated profanity and thus failed to demonstrate it would have discharged employee in the absence of protected activity); and *Smith Auto Service*, supra, 252 NLRB at 613 (discharge for cursing pretextual where cursing was common). Furthermore, the Respondent knew prior to its decision to discharge that Stimpson had neither directed his comment to Gunnery nor engaged in the same confrontational behavior that both he and Gunnery had engaged in on August 17. Nor could Stimpson's comment be reasonably described as "intimidating" to either Rodriguez or Gunnery. These differences undermine the Respondent's reliance on the prior incident to support the discharge. Further undermining the Respondent's stated reasons for the discharge, the Respondent chose not to interview Stimpson before discharging him.[11]

[7] Consistent with his written statement, Lee testified that he told Wilson that Stimpson hit something while driving; that Ernie remarked that he would get Gunnery to teach him how to drive; that Stimpson made the remark *to Ernie* that he did not ask him how to suck a dick; that Gunnery came from behind Lee and asked him what had been said; and that, after being told, Gunnery went toward Stimpson but that Stimpson had continued on driving. Rodriguez did not testify. Gunnery did not testify and his statement was not introduced into evidence. Wilson testified that he had been informed that Stimpson made the comment to Rodriguez and "not directly" to Gunnery.

[8] For example, Staiger testified that Wilson has used the words "fuck" and "fucker" and male employees use the terms "cock sucker" and "suck dick."

[9] With respect to the "troublemaker" comments, the Board found in *James Julian Inc. of Delaware*, 325 NLRB 1109, 1111 (1998), that an employer's reference to a union steward who had filed numerous grievances as a "troublemaker" constituted evidence of animus. See also *Knoxville Distribution Co.*, 298 NLRB 688 (1990), enfd. mem. 919 F.2d 141 (6th Cir. 1990) (employer's comment that it did not need "troublemakers" evidence of animus).

[10] We therefore find that the Respondent's unlawful animus was directed against Stimpson, and was not remote in time. In this regard, we note that Wilson made the "troublemaker" statement directly to Stimpson and about Stimpson in response to his filing of grievances during a period in which he had been filing numerous grievances. We also find that the making of this statement about 6 months prior to the discharge is not too remote in time because an employer might wait for a pretextual opportunity to discipline an employee. See *Naomi Knitting Plant*, 328 NLRB 1279, 1282–1283 fn. 18 (1999) ("[a]n employer might wait for a pretextual opportunity to discipline an employee for engaging in protected activity"); and *Smith Auto Service*, 252 NLRB 610, 613 (1980) (employer waited for pretext). While Wilson's spring 1998 statement directly to Stimpson is sufficient alone to establish animus, we also rely on the Respondent's earlier expressions of animus, in 1996 and 1997, despite the passage of time, because Wilson, the same supervisor involved in Stimpson's discharge, also made the earlier statements expressing the same hostility towards the filing of grievances.

[11] See, e.g., *Coronet Foods, Inc.*, 305 NLRB 79, 89 (1991), enfd. on other grounds 981 F.2d 1284 (D.C. Cir. 1993) (failure to give employee a meaningful opportunity to defend himself regarding severe discipline for relatively minor incident indicates pretextual motive for discharge).

Our dissenting colleague contends that the Respondent met its evidentiary burden under *Wright Line* by establishing that it discharged Stimpson because it "desire[d] to maintain order and civility in its workplace." But what are fighting words in some workplaces may be everyday banter in another. Indeed, the record shows that profane and derogatory statements are common in this workplace and, as a practical matter, it is likely that some of these same vulgarities have been expressed in the past to other employees or to third parties, as occurred on October 1. Still, the record is barren of any evidence that any employee, other than Stimpson, has ever been disciplined in any fashion for profane or vulgar comments.

We are, of course, mindful that the October 1 name-calling incident was preceded weeks earlier by the personal confrontation between Stimpson and employee Gunnery. Our dissenting colleague properly acknowledges that the "name-calling was addressed to a third person." But, unlike our colleague, we believe that fact is significant here.

In finding that Stimpson had a "proclivity" to confront other employees, in turn, the dissent relies on Manager Wilson's testimony that he considered Stimpson a threat to the workplace by, among other things, "stirring stuff up" and "causing trouble." These descriptions by Wilson of Stimpson's alleged interactions with other persons are, of course, quite similar to Wilson's statement to Stimpson that he was a "troublemaker" for filing grievances. Indeed, Wilson's testimony elsewhere that Stimpson's grievance filing had no bearing whatsoever on the discharge was implicitly discredited. In view of these and the other factors that undermine Wilson's credibility on the issue of motive, we cannot join our dissenting colleague in relying on his testimony.

Accordingly, we find that the Respondent's reasons for the discharge are pretextual and that the Respondent has not shown that it would have discharged Stimpson in the absence of his protected activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, United Parcel Service, Madison Heights, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order, as modified.

1. Delete paragraph 1(b) and replace it with the following.

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Delete paragraph 2(c) and replace it with the following.

"(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Add the following as paragraph 2(e).

"(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

4. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 30, 2003

Wilma B. Liebman,

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

I would dismiss the complaint in this case and find that the Respondent did not violate the Act by discharging employee Paul Stimpson. I agree with my colleagues that the General Counsel has met his initial burden of proving that Stimpson's protected activity in filing numerous grievances was a factor motivating his discharge. I find, however, that the Respondent rebutted this evidence by showing that it would have discharged Stimpson even absent his protected activity. Consequently, on a review of the record as a whole, the General Counsel failed to prove a violation by a preponderance of the evidence.

On August 17, 1998, Stimpson was engaged in an altercation with Kevin Gunnery, which involved the use of vulgar language and name-calling, as well as physical threats. The Respondent's manager, Wilson, gave both employees a "last-chance" warning that they would be discharged if it happened again. Weeks later, on October 1, 1998, with Gunnery present in the general shop floor area, Stimpson again referred to Gunnery in derogatory and vulgar language. Upon learning from other employees what had been said, Gunnery started to walk after

In addition, the Respondent shifted its reasons for the discharge by dropping its assertion that Stimpson had engaged in sexual harassment. See *U. S. Coachworks, Inc.*, 334 NLRB 955, 957 (2001) (employer's failure to offer rational and consistent account of its actions may support an inference that the asserted reasons are not the real reasons); and *Naomi Knitting Plant*, supra, 328 NLRB at 1283 (shifting justification for discharge is evidence of discriminatory motivation).

Stimpson to confront him. Although no confrontation ensued, Gunnery complained to Wilson, who knew of Stimpson's history of "prior . . . problems with employees." Wilson considered Stimpson a "threat to the workplace" because of his fighting, language, "stirring stuff up," and "causing trouble."[1] The Respondent discharged Stimpson in accordance with Section 17(i) of the collective-bargaining agreement.[2] My colleagues minimize this testimony by discrediting Wilson's entire testimony. The majority goes further than the judge did. I find no basis in the record for doing so.

I find that the record supports a finding that the Respondent discharged Stimpson because of his proclivity to incite confrontation with employees, the most recent of which was Gunnery. I do not dispute that vulgarity may be commonplace at this worksite. However, an entirely different picture is presented when Stimpson addresses his vulgar name-calling toward the same employee with whom he recently had an altercation, and for which he received a last-chance warning. The fact that the name-calling was addressed to a third person does not minimize what happened. On the contrary, derogatory statements made to third parties can be more offensive than if the statements were made directly without involving others. The fact that Gunnery immediately became upset and tried to confront Stimpson is ample proof of that fact. Further, no evidence was presented to show that Stimpson was being treated disparately by being discharged in conformance with a last-chance warning.

Stimpson filed numerous grievances of which Respondent was obviously aware, but the General Counsel did not satisfy his ultimate burden of proving by a preponderance of the evidence that this protected activity, rather than the Respondent's desire to maintain order and civility in its workplace, motivated Stimpson's discharge. In its *Wright Line* framework for analyzing mixed-motive discharges, the Board quoted the following admonition given by the Supreme Court under analogous circumstances:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision . . . could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . . [An employee] ought not to be able, by engaging in such conduct, to prevent his employer from [making a decision based on performance], simply because the protected conduct makes the employer more certain of the correctness of its decisions.

Wright Line, 251 NLRB 1083, 1086 (1980) (quoting *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285–286 (1977)). It appears to me, by finding an 8(a)(3) discharge here, the majority puts Stimpson in a better position because he engaged in protected activity than he would have been in if he had done nothing. This is a result with which I cannot agree

Accordingly, I respectfully dissent.

Dated, Washington, D.C. September 30, 2003

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend or discharge any employees because they file grievances under the collective-bargaining agreement or engage in union or protected activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Paul Stimpson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole, with interest, for any loss of pay he may have suffered as a result of his discharge.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Paul Stimpson and WE WILL, within 3 days thereafter, notify him in writing that we have done so and that we will not use the discharge against him in any way.

UNITED PARCEL SERVICE

[1] This language is quoted from Wilson's hearing testimony.

[2] This provision states, "The Employer shall not discharge nor suspend any employee without just cause. No employee shall be suspended or discharged without first being given (1) warning letter of a complaint and also be given a local level hearing except for the following offenses . . . (i) other serious offenses."

Dwight R. Kirksey, Esq., for the General Counsel.
Raymond J. Carey, Esq. (Miller, Canfield, Paddock & Stone, P.L.C.), of Detroit, Michigan, for the Respondent.
Ellis Boal, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried on July 13, 1999, in Detroit, Michigan, on a complaint dated April 8, 1999. The charge was filed by Paul Stimpson, an individual, on February 9, 1999. The charge was amended on March 11, 1999. The Respondent, United Parcel Service, filed an answer on April 23, 1999, admitting the jurisdictional allegations in the complaint and denying the substantive allegations that it had violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act).

The issue is whether the Respondent suspended and discharged Paul Stimpson for engaging in protected activities, i.e., the filing of grievances against the Respondent.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, United Parcel Service, with an office and place of business at 1400 East Whitcomb, Madison Heights, Michigan, the Madison Heights facility, is engaged in the interstate and intrastate delivery of packages and goods. As a corporation with revenues in excess of $50,000 from the transportation of items between and among the various States of the United States, the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, Local 243, International Brotherhood of Teamsters, AFL–CIO, the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

2. Facts

Paul Stimpson, a part-time employee for United Parcel Service at the Madison Heights, Michigan facility, was informed of his discharge by letter of October 6, 1998 (GC Exh.. 13 A):

> On October 2, 1998, you were suspended pending further investigation for your comments on October 1, 1998.
>
> Please be advised that our investigation of the incident is concluded and it disclosed that your comments directed towards another employee, while in the employ of the United Parcel Service were totally inappropriate, intimidating, antagonistic and offensive.
>
> Your comments also could be construed as sexual harassment, towards a fellow employee.
>
> Your comments are unacceptable and will not be tolerated.
>
> Therefore, pursuant to Article 17(l), other serious offenses, of the C.R.T. Supplemental Agreement, you are hereby officially notified your employment with United Parcel Service is terminated effective immediately.

Stimpson had been employed since October 1991 as a part-time sorter. In that capacity, he sorted packages to different belts according to zip codes and city and street information. He worked on "pre-load" in the mornings, "call air" at nights, and Saturday delivering. The incident leading to his discharge occurred while he was "pre-loading," and driving the bulk train, consisting of several carts loaded with packages hauled by a golfcart.

Paul Stimpson filed a number of grievances against the Respondent alleging that the Respondent violated the terms of the agreement, although most grievances were concerned with his own employment problems. The Respondent and the Union, Local 243, International Brotherhood of Teamsters, AFL–CIO, are parties to a collective-bargaining agreement effective August 1, 1997, to July 31, 2002. For example, on June 26, 1997, Stimpson filed a grievance because the Respondent had written him a letter critical of his repeated job injuries (GC Exh. 3). On July 11, 1997, he filed a grievance alleging sexual harassment because of a rumor circulating in the workplace that he engaged prostitutes and mistreated his girlfriend (GC Exh. 4). On July 14, 1997, Stimpson filed a grievance about the Company's treatment of another employee who had less seniority than Stimpson (GC Exh. 5). Stimpson's grievance of July 28, 1997, charged the Employer with his wrongful suspension, because of a derogatory statement about another employee (GC Exh. 6). Stimpson's next grievance challenged the Company's accusation on September 27, 1997, that Stimpson was drunk and hung over at work (GC Exh. 7). Several days later, Stimpson filed another grievance, dated October 6, 1997, concerning his supervisor's insulting remarks during a discussion on September 30, 1997, about the seniority schedule (GC Exh. 8).

Stimpson filed a grievance dated December 14, 1997, because he had received an oral and a written warning concerning the frequent injuries while working (GC Exh. 10). During a meeting on December 7, 1997, between Bruce Weber, division manager, Stimpson and a union steward, Weber said the following (Tr. 46):

> He was telling me that he worked there 27 years and he's only been injured twice in 27 years and I've only been there like six years and been injured 13 times. He told me that I'm the kind of employee that—they don't need my kind of employee there. I'm not the kind of employee they need there.
>
> Stimpson replied: "I wouldn't get hurt as much if I had a safer workplace."

By letter of December 9, 1997, the Respondent warned Stimpson that he had incurred too many job-related injuries (GC Exh. 9):

> On June 23, 1997, you received a letter stating that you have had 13 on the job injuries. Furthermore, the letter went on to inform you that we will no longer accept you working in an unsafe manner, resulting in injury. The letter also stated and I quote it, that if you persist in performing your job in an unsafe manner, you will leave us no alternative but to take disciplinary action up to an including discharge. It is your choice.
>
> Paul, on November 26, 1997, you again went to the clinic for a sore wrist because as your prevention report states you pinched it between 2 boxes on the sort aisle and failed to keep your eyes ahead of your work. This makes 14 on the job injuries you have had while working at United Parcel Service. To make matters worse you have

not returned to the clinic for follow up visits as instructed by clinic doctors.

Therefore, pursuant to Article 17 of the C.C.T. Supplemental Agreement, I find it necessary to officially warn you. Any repetition of the above will result in more severe disciplinary action.

Stimpson filed a grievance dated January 18, 1998, in which he complained that the Company had failed to check on certain information that he had requested during a grievance hearing held on October 12, 1997 (GC Exh. 11). Another grievance, dated February 24, 1998, raised a question about a prior writeup that Stimpson had received for leaving parcels in the wrong place (GC Exh. 12).

Stimpson wrote a letter dated December 15, 1997, addressed to Ken Wilson requesting certain information, including job injury records, from the Employer (GC Exh. 14). The information request was also signed by Tom Gren, the union steward. Stimpson handed the letter to Wilson. However, Wilson failed to respond to the request.

Even though the Respondent did not expressly warn Stimpson about the numerous grievances, Stimpson believed that the Company showed hostility towards him. He testified (Tr. 155):

> I know Ken [Wilson] said that every time I file a grievance he always brings up all the grievances in the past and all that crap in the past . . . I just know that every time I'd turn in a grievance to Vince or Ken they'd both be saying, oh, he did this back then, he filed this grievance back then, quit filing grievances.

According to Stimpson, Wilson had called him a troublemaker because of his involvement in filing numerous grievances.

Respondent's hostility towards employees for the filing of grievances was supported by the testimony David Staiger, an employee at Respondent's Madison Heights facility and a union steward. He testified that in July 1996 when he presented a grievance signed by several employees to management Wilson became angry and stated that he would watch anyone who had signed the grievance and that he would write them up for missorting packages (G.C. Exh. 18).

The General Counsel also argues that the record shows the Respondent's hostility towards Stimpson's involvement in filing an unfair labor practice charge. After the Respondent failed to respond to the information request of December 15, 1997, Stimpson consulted with the Union. The Union executed an unfair labor practice charge on January 21, 1998. Although signed on that date by Tom Gren, the union steward, the charge was not filed until February 24, 1998 (G.C. Exh. 15). Stimpson filed the charge after the Respondent had failed to provide any information relating to his grievance hearing scheduled for February 25, 1998 (GC Exh. 16). Stimpson testified that Wilson asked him, "why are you filing these bull shit charges against us" (Tr. 61). Althea Streeter, an employee at the Madison Heights facility and a union steward, testifying about the same incident similarly, recalled that she observed Wilson and that he appeared upset and that he referred to the charges as "Bull shit charges." In his testimony, Wilson claimed that he was unaware that charges had been filed at the time of the conversations. However, based on demeanor and the implausibility of some of the testimony, I have not credited his testimony. Staiger and Streeter were impartial witnesses and impressed me as credible.

Turning to the incidents, which precipitated the discharge, the record shows that Stimpson used an obscene expression in referring to a fellow employee and was promptly suspended and subsequently discharged. On August 17, 1998, Stimpson and fellow employee Kevin Gunnery worked as sorters. Gunnery placed packages on a conveyor belt. Some of the parcels became entangled at the drop-off point. Gunnery proceeded to walk on the conveyor belt to the problem area to dislodge the parcels. According to company rules, only supervisors were permitted to walk on conveyor belts. Stimpson, who had observed Gunnery's conduct, reminded him that he was not a manager or supervisor and called him a "kiss ass." Gunnery responded by yelling profanities and threatening "to beat his ass." Stimpson accepted the challenge and motioned to Gunnery to come down from the conveyor belt. Wilson summoned both men to his office, because Gunnery had complained to management that Stimpson had threatened him. Wilson warned Stimpson and Gunnery that he would not tolerate such behavior in the future, and that they would be fired if it happened again. On October 1, 1998, Stimpson and Gunnery were at work driving bulk trains near line 8. Stimpson accidentally hit a pushcart causing some packages to fall. Ernie Rodriguez, another employee in the vicinity who had observed Stimpson's accident, said to Stimpson that he should take driving lessons from Kevin Gunnery and learn to drive like him. Stimpson retorted jokingly, "I don't want to learn how to be a suck dick." Tim Lee, another employee, overheard the remark. He, Rodriguez, and Stimpson all laughed. Gunnery, driving his bulk train, appeared on the scene, and asked Lee what was said. Lee reported to Gunnery what Stimpson had said about him.

Gunnery promptly reported the remark to Wilson complaining that Stimpson had called him a "cock sucker." Wilson obtained written statements about the incident from Lee, Rodriguez, and Gunnery (CP Exhs. 3, 4). Wilson, after consulting with his supervisor, decided to suspend Stimpson and, after further consideration, discharged him per letter of October 6, 1998 (GC Exh. 13 A).

3. Discussion

At first blush, the Employer did not appear to have acted unreasonably for discharging an employee for referring to a fellow employee in such a derogatory fashion. For the record is clear and undisputed that Stimpson had engaged in the misconduct and had admittedly used a vulgar term on October 1, 1998, in referring to a fellow employee. Wilson testified that Stimpson's involvement in filing numerous grievances had no bearing on his decision to discharge Stimpson. According to Wilson, Stimpson had a history of problems with employees and was a threat to the workplace, because Stimpson had called Gunnery a "cock sucker" in front of other hourly people and some of the employees were laughing about it. Stimpson had been warned before. Indeed, Stimpson's grievance about this incident was processed according to the procedure contained in the collective-bargaining agreement. After a hearing, the Michigan Teamsters UPS Joint Grievance Committee denied the Union's claim, which had presented Stimpson's grievance (R. Exh. 9).

It is clear, however, that the panel, which had denied the grievance had not considered the prior grievances or the unfair labor practice charge filed by Stimpson. Moreover, the record clearly shows that the use of profanity and obscene expressions are common occurrences among the employees. Indeed, even

supervisors, including Wilson, have been overheard to use profanities. Staiger testified without contradiction that supervisors used words like "fuck," "fucker," or "God-damn." Curse words were used in the workplace on a daily basis, and the use of words like "cock sucker" or "suck dick" were not uncommon among the male employees.

Significantly, there is no showing that any other employee was ever discharged for the use of such profanities or obscenities at the Madison Heights facility. That the Employer may have discriminated against this employee for engaging in conduct, which is otherwise a daily or common occurrence, is therefore a reasonable inference. The reason for the discrimination was the Respondent's antipathy towards Stimpson for filing the unprecedented high number of grievances. Wilson considered him to be a troublemaker.[13]

Considering the record as a whole I find that the General Counsel has made out a prima facie case by showing, (a) Stimpson, by filing grievances, engaged in union or protected activity, (b) the Employer knew of the activity, (c) the Respondent's hostility or animus towards the protected activity and (d) the Company's adverse action taken against the employee. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Company has failed to carry the burden of showing that its conduct would have taken place even in the absence of Stimpson's protected activity. I accordingly find that the Respondent violated Section 8(a)(3) and (1) of the Act. The General Counsel further urges a finding of an 8(a)(4) violation as a result of Respondent's discriminatory conduct after Stimpson filed the unfair labor practice charge. In this regard, the only evidence of animus by the Respondent is Wilson's characterization of the charge as "bull shit" charges. Wilson's conduct in this regard is too ambiguous to support the finding of an 8(a)(4) allegation. Wilson could have simply thought that the charges lacked merit or were unjustified. He certainly has the right to express his disagreement in that regard without being considered hostile to an employee's right to file unfair labor practice charges. I would, therefore, dismiss this allegation in the complaint.[14]

The Respondent finally argues that the Board should defer to the postarbitral decision by the grievance committee. *Olin Corp.*, 268 NLRB 573 (1984); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). The decision by the panel was based on its consideration of Stimpson's misconduct without any reference to his protected activity. One of the principal requirements of deferral is whether or not the unfair labor practice issue was presented and considered by the panel. Clearly it was not. It is accordingly clear that deferral is inappropriate under these circumstances.

CONCLUSIONS OF LAW

1. The Respondent, United Parcel Service, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Paul Stimpson for engaging in union or protected activity.

4. This unfair labor practice has an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Further, the Respondent shall be required to offer employees Paul Stimpson immediate and full reinstatement to his former position of employment and make him whole for any loss of wages and other benefits he may have suffered by reason of Respondent's discrimination against him in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondent shall be required to post an appropriate notice, attached as an "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, United Parcel Service, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or suspending employees because they file grievances under the provisions of the collective-bargaining agreement or engage in any other union or protected activity.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Within 14 days from the date of this Order, offer Paul Stimpson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to seniority or any other rights or privileges previously enjoyed. Make Paul Stimpson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[13] Wilson never disputed Stimpson's testimony that Wilson considered Stimpson a troublemaker for filing numerous grievances.

[14] In so finding I do not rely on Wilson's testimony that he was totally unaware that the unfair labor practices had been filed when he decided to terminate Stimpson's employment.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days after service by the Region, post at its facility in Madison Heights, Michigan, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2, 1998.

Dated, Washington, D.C. December 27, 1999

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend or discharge employees because they filed grievances under the collective-bargaining agreement or engage in union or protected activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL offer reinstatement to Paul Stimpson to his former job and make him whole for any loss of earnings or other benefits suffered as a result of our discrimination against him with interest.

UNITED PARCEL SERVICE

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."